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No. 00-182

In the Supreme Court of the United States

GERALD E. TAYLOR AND BETTY A. TAYLOR,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a bankruptcy court may take a debtor's income from a pension plan into account for purposes of determining whether he has sufficient disposable income to repay his debts and thus whether discharging those debts would constitute a "substantial abuse" of Chapter 7 of the Bankruptcy Code.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 212 F.3d 395. The opinion of the district court (Pet. App. 6a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 2000. The petition for a writ of certiorari was filed on August 3, 2000, and entered on the Court's docket on August 4, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, a married couple, filed a voluntary petition for relief under Chapter 7 of the Bankruptcy

Code (11 U.S.C. 701 *et seq.*). They represented that they had reasonable monthly expenses of $2799.64 and net monthly income of $4603.48, including $2665.48 from current employment and $1770 from petitioner Gerald Taylor's pension from Deere & Co. The Deere & Co. pension plan is a qualified plan under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* Pet. App. 2a, 7a; C.A. App. 62-63.

The United States Trustee moved to dismiss petitioners' Chapter 7 petition for "substantial abuse" pursuant to 11 U.S.C. 707(b) (1994 & Supp. IV 1998).[1] Under circuit precedent, in evaluating a claim of "substantial abuse," a bankruptcy court focuses on whether the debtor has the ability to repay a substantial portion of his unsecured consumer debt, which the court measures by evaluating what the debtor's financial condition would be in a "hypothetical chapter 13 proceeding." *In re Koch*, 109 F.3d 1285, 1288 (8th Cir. 1997).[2]

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[1] Section 707(b) states, in relevant part:

> After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

[2] Under Chapter 13 (11 U.S.C. 1301 *et seq.*), "an individual with regular income" has the option of preserving his assets through a plan funded primarily with that income. 11 U.S.C. 109(e). If an unsecured creditor or trustee objects to the confirmation of the Chapter 13 plan, the debtor still may obtain relief under Chapter 13 if the plan "provides that all of the debtor's projected disposable income * * * will be applied to make payments under the plan." 11 U.S.C. 1325(b)(1)(B). The statute defines "disposable income" as income received by the debtor that is not reasonably necessary

The parties stipulated that, if the payments that petitioners received from the Deere & Co. pension plan were included in their "disposable income" for purposes of such an analysis, see 11 U.S.C. 1325(b) (1994 & Supp. IV 1998), petitioners' income would exceed their reasonable expenses by $1803.84 a month. That would generate a dividend to unsecured creditors of $64,938.24 over 36 months and $108,230.40 over 60 months—a 59.91% payout and a 99.84% payout, respectively, based on petitioners' $108,400 in total unsecured debt. The parties stipulated that petitioners' income otherwise would exceed their reasonable expenses by only $33.84 a month, generating a dividend to unsecured creditors of $1218.24 over 36 months and $2030.40 over 60 months. Accordingly, the parties agreed that whether petitioners had the ability to repay a substantial portion of their unsecured consumer debt turned on whether the payments that they received under the pension plan could be included in their "disposable income." Pet. App. 8a; C.A. App. 64-65.

2. The bankruptcy court granted the United States Trustee's motion to dismiss petitioners' Chapter 7 petition on grounds of substantial abuse. The court rejected petitioners' contention that ERISA's anti-alienation provision—which states that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated," 29 U.S.C. 1056(d)(1)—prevented the payments made to petitioners under the Deere & Co. pension plan from being included in their disposable income. C.A. App. 88-92. The court then held that petitioners had sufficient disposable income "to pay a significant portion of their

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to support the debtor, his dependents, or his business. 11 U.S.C. 1325(b)(2) (1994 & Supp. IV 1998).

debt" once the payments under the pension plan were included. *Id.* at 97.[3]

3. The district court affirmed. Pet. App. 6a-12a. The court concluded that ERISA's anti-alienation provision did not require the bankruptcy court to ignore the pension income in calculating petitioners' total disposable income. The court reasoned that, while "pension benefits may be exempt property, a debtor's ability to claim an exemption is an independent issue from whether the debtor has the ability to repay his or her debts." *Id.* at 10a. The court noted that Social Security benefits, which are also subject to an anti-alienation provision, may be considered in assessing a debtor's disposable income under Chapter 13. *Id.* at 11a.

4. The court of appeals, in turn, affirmed. Pet. App. 1a-5a. The court agreed that a bankruptcy court may take a debtor's income from an ERISA pension plan into account in determining whether the debtor has sufficient disposable income to repay his debts and thus to preclude resort to Chapter 7. *Id.* at 4a-5a. The court explained that the application of ERISA's anti-alienation provision to the present case was not controlled by *Patterson* v. *Shumate*, 504 U.S. 753 (1992), which held that an individual's interest in an ERISA pension plan is exempt from the reach of creditors. The court explained that "the relevant inquiry is not whether the payments are exempt from creditors in a Chapter 7 proceeding but whether the challenged payments

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[3] The transcript of the argument on the motion in bankruptcy court, including the court's oral ruling, was not included in the appendix to the petition for a writ of certiorari. It may be found in the appendix in the court of appeals at pages 80-99.

would constitute income in a hypothetical proceeding under Chapter 13." Pet. App. 3a.

ARGUMENT

The only issue raised by the petition is whether ERISA's anti-alienation provision, 29 U.S.C. 1056(d)(1), prevents a bankruptcy court from considering a debtor's income from a pension plan in determining whether he has sufficient disposable income to repay most or all of his unsecured consumer debt, such that discharging him from that debt would constitute "a substantial abuse" of Chapter 7 of the Bankruptcy Code. See 11 U.S.C. 707(b) (1994 & Supp. IV 1998).[4] The Eighth Circuit's resolution of that issue is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. ERISA's anti-alienation provision states that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. 1056(d)(1). A regulation issued by the Department of the Treasury reiterates that prohibition,

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[4] While petitioners imply that the Eighth Circuit's case law holding that a court determines whether a Chapter 7 petition should be dismissed for substantial abuse by evaluating a "hypothetical" Chapter 13 petition is questionable (see Pet. 9 & 11 n.7), they do not challenge that case law for purposes of the petition. See Pet. 9-15 (complaining that court of appeals misapplied the test). Nor do they assert a circuit conflict based on the slightly varying standards applied by the circuits in assessing substantial abuse. Every circuit that has addressed the substantial abuse issue under 11 U.S.C. 707(b) (1994 & Supp. IV 1998) has agreed that a debtor's ability to repay his creditors is at least an important factor in whether to dismiss a Chapter 7 petition. See generally *In re Stewart*, 175 F.3d 796, 808-809 (10th Cir. 1999) (discussing cases in six other circuits).

26 C.F.R. 1.401(a)-13(b)(1), and defines the terms "assignment" and "alienation" as:

> [a]ny direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary.

26 C.F.R. 1.401(a)-13(c)(1)(ii).

This case does not involve *any* assignment or alienation whatsoever, much less the sort of assignment or alienation that ERISA prohibits. First, the bankruptcy court simply held that petitioners were not entitled to be discharged from their debts—*i.e.*, that granting them such relief would constitute "a substantial abuse" within the meaning of Section 707(b)—because they have sufficient disposable income, including their pension income, with which to repay those debts. The bankruptcy court, in accord with circuit precedent, reached that conclusion by considering whether petitioners could adequately fund a "hypothetical" Chapter 13 plan, *i.e.*, a plan under which a debtor may repay his creditors over a three-to five-year period out of his current income.[5] The bankruptcy court's ruling thus

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[5] The rationale behind that hypothetical determination is that, if a Chapter 7 debtor has regular disposable income sufficient to repay a substantial portion of his unsecured consumer debt, it would constitute a "substantial abuse" of Chapter 7 to discharge him from that debt. The bankruptcy court thus determines whether the debtor would have sufficient "disposable income," see 11 U.S.C. 1325(b) (1994 & Supp. IV 1998), to support a Chapter 13 plan to repay most of his debt over a three- to five-year period. If such a hypothetical Chapter 13 plan could be adequately funded, the Eighth Circuit deems it a substantial abuse to allow the debtor

did not cause any creditor to "acquire[]" from petitioners any "right or interest * * * in, or to, all or part of a plan benefit payment." 26 C.F.R. 1.401(a)-13(c)(1)(ii). It left petitioners' interest in their benefits under the Deere & Co. pension plan undisturbed.[6]

Second, Section 1056(d)(1) does not restrict a participant or beneficiary from alienating pension plan assets after those assets have been distributed to him. The participant or beneficiary may "alienate" or "assign" such assets to the same extent that he may alienate or assign his other assets, and a number of courts of appeals have held that creditors may reach such assets to the same extent that they may reach the participant's or beneficiary's other assets. See, *e.g.*, *Robbins* v. *DeBuono*, 218 F.3d 197, 203 (2d Cir. 2000) (holding that ERISA's anti-alienation provision "protects benefits only while they are held by the plan administrator and not after they reach the hands of the beneficiary"), petition for cert. pending (No. 00-489) (filed Sept. 28, 2000); accord *Wright* v. *Riveland*, 219 F.3d 905, 919-921 (9th Cir. 2000); *Trucking Employees of N. Jersey Welfare Fund, Inc.* v. *Colville*, 16 F.3d 52, 55 (3d Cir.

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to seek a discharge under Chapter 7. See *In re Koch*, 109 F.3d 1285, 1288 (1997).

[6] Indeed, petitioners' position would suggest, for example, that a lender, in determining whether an individual has sufficient income to qualify for a mortgage or other credit, could not take into account the individual's income from a pension. It would also suggest that a debtor cannot use his pension income to fund a Chapter 13 plan, under which a debtor may repay his creditors out of current income while preserving his home and other significant assets. Such rules would severely disadvantage those whose income comes primarily from pensions. There is no reason to suppose that ERISA's anti-alienation clause was intended to produce such results.

1994).[7] Here, in assessing whether petitioners would have sufficient disposable income over a three-to five-year period to repay a substantial portion of their debts, the bankruptcy court took into account the funds that would be distributed to petitioners over that period from the Deere & Co. pension plan, *i.e.*, the funds that petitioners themselves could freely alienate or assign without regard to Section 1056(d)(1). The bankruptcy court did *not* include in its calculation any of the funds that would remain in the pension plan to provide for petitioners' future support.[8]

2. Contrary to petitioners' assertion (Pet. 5), the court of appeals' decision in this case does not "conflict[] in principle with" either *Patterson* v. *Shumate*, 504 U.S. 753 (1992), or *Guidry* v. *Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990). *Patterson* and

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[7] In *United States* v. *Smith*, 47 F.3d 681 (4th Cir. 1995), the court of appeals invalidated, as contrary to ERISA's anti-alienation provision, a district court's requirement that a defendant convicted of mail and wire fraud "turn over upon receipt each month the entire amount of his pension benefits payable under an ERISA plan" as restitution. *Id.* at 682. This would not be an appropriate case in which to resolve any tension between *Smith* and the cases cited in the text, because this case, unlike all of those cases, does not involve any alienation of benefits. The Fourth Circuit has not suggested that a bankruptcy court cannot, as in this case, take a debtor's pension income into account in assessing whether the debtor has sufficient disposable income to repay his creditors, and thus whether granting the debtor a discharge under Chapter 7 would constitute "substantial abuse" within the meaning of 11 U.S.C. 707(b) (1994 & Supp. IV 1998).

[8] A different question would be presented if a bankruptcy court included in the hypothetical Chapter 13 analysis pension funds not already being distributed to the debtor as income (*e.g.*, if the court considered funds that the debtor could receive only by obtaining a loan from the pension plan or by electing early retirement).

Guidry are unlike this case for both of the reasons discussed above. Those cases involved an actual (attempted) alienation of assets, not a mere calculation of an individual's disposable income; and those cases involved assets still in the pension plan, not assets that had already been distributed to a participant or beneficiary.

In *Patterson*, after an individual debtor had filed for bankruptcy protection under Chapter 7, the trustee sought to recover the debtor's interest in his pension plan for the benefit of the bankruptcy estate. This Court held that ERISA's anti-alienation provision, as a "restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law," 11 U.S.C. 541(c)(2), prevented the transfer of the debtor's interest in the pension plan to the estate. *Patterson*, 504 U.S. at 757-760. The Court was thus concerned only with pension benefits that had not been distributed to the debtor.

In *Guidry*, after a union officer had been found guilty of embezzling funds from the union, the district court imposed a constructive trust on any right that he might have to benefits under his union pension, "so that the benefits would be paid to the Union rather than to" the officer. 493 U.S. at 369. This Court held that the constructive trust violated Congress's choice, embodied in ERISA's anti-alienation provision, "to safeguard a stream of income for pensioners." *Id.* at 376. Again, the Court was concerned only with pension benefits that had not been distributed to the officer. The Court did not hold that the officer's pension income, once paid out to him by the pension plan, would be beyond the reach of the union or other creditors. Indeed, the Tenth Circuit, on remand, held that the anti-alienation provision did not bar the garnishment of the officer's bank

account into which his pension benefits were paid. *Guidry* v. *Sheet Metal Workers Nat'l Pension Fund*, 39 F.3d 1078, 1082-1083 (1994) (en banc), cert. denied, 514 U.S. 1063 (1995).

In sum, neither *Guidry* nor *Patterson* provides any support for petitioners' contention that ERISA's anti-alienation provision prevented the bankruptcy court from taking their pension income into account in assessing whether they had sufficient disposable income to repay their creditors.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] There is no reason for the Court to hold the petition in this case for disposition in light of *Egelhoff* v. *Egelhoff*, No. 99-1529, which presents the question whether ERISA preempts a state law that purports to revoke upon divorce a plan participant's designation of his spouse as beneficiary pursuant to the terms of an ERISA plan. In that case, the petitioner and the United States, as amicus curiae, have argued, among other things, that the state law, as applied to ERISA pension plans, conflicts with ERISA's anti-alienation provision. See Pet. Br. 36-41; U.S. Br. 24-25. This case is distinguishable from *Egelhoff*, which involves a statute that purports to effect an actual alienation of a beneficiary's interest in an ERISA pension plan.